Quality Control Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union 1579. Cases 11–CA–15835, 11–CA–15914, and 11–CA–15976

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On February 7, 1996, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a brief answering the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as clarified below and to adopt the recommended Order as modified and set forth in full below.[2]

We agree with the judge that the Respondent made statements in violation of Section 8(a)(1) and violated Section 8(a)(3) by denying employment to four job applicants because they were members of the Union.

With respect to the 8(a)(1) statements, Jack Powell, the superintendent of the Respondent's Publix store jobsite in North Augusta, South Carolina, told union member applicants on three occasions that the Respondent would not hire them because of their union affiliation. Specifically, on November 5, 1993,[3] Powell told applicant Noah Newman that the Respondent's owner had told him that Newman could not be hired because of his union membership. On November 8, Powell told Newman and applicant Jimmy King that there was no problem with their applications, except for their union affiliation. Powell further explained to Newman that a couple of years earlier, the Union had tried to organize the nonunion electrical contractors in the area, and now these companies, like the Respondent, were afraid to hire union members because they did not want to be organized.[4] In mid-November, Powell told King that although he was having a hard time manning the North Augusta job, King's union affiliation was "the big negative" concerning his employment application. These unlawful statements by Powell stand out not only as independent violations of the Act; they are, as seen below, critical components in the analysis of the legality of the Respondent's refusal to hire Newman, King, and two other union member applicants—Alfred Wedereit and Jeffery Donelow.[5]

Under *Wright Line*,[6] the General Counsel's prima facie case of unlawful discrimination requires submission of evidence supporting an inference that *a* motive behind an employer's alleged unlawful conduct is discriminatory. 251 NLRB at 1089. In his analysis of the General Counsel's prima facie showing in this case, the judge found that Powell's unlawful statements "directly prove the [Respondent's] illegal motivation." We agree. In effect, these statements constitute affirmative evidence that the *sole* motive behind the Respondent's failure to hire the four discriminatees was their membership in the Union.[7] This is more than *Wright Line* requires, and a very difficult evidentiary showing for the Respondent to rebut. As a practical matter, the Respondent needed to discredit the implicating statements of its agent in this case, and it did not succeed.

In this vein, the Respondent contends in its exceptions that Powell had no involvement in the hiring process, so that no inference of knowledge of union affiliation or antiunion motivation should be attributed to the Respondent based on his unlawful statements. In sum, the Respondent argues that Lisa Parrish, its assistant vice president, made all hiring decisions, that she was oblivious to the union affiliation of any of the four alleged discriminatees, and that she legitimately relied on their lack of commercial electrical experience as a basis for not hiring them.[8]

We find no merit in the Respondent's contentions. They rely, at least in part, on a challenge to the judge's demeanor based discrediting of Parrish's testimony. As previously stated, we find no basis for re-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In agreement with the General Counsel's exception, we will add a remedial paragraph ordering the Respondent to cease and desist from refusing to hire job applicants because of their union membership. We will also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] All dates are in 1993 unless otherwise noted.

[4] Spencer Tyson, the Respondent's owner and president, testified that the Union had waged an unsuccessful organizing campaign against the Respondent about 3 years earlier.

[5] The Respondent filed no exceptions to the judge's 8(a)(1) findings or to the findings of supervisory and agency status concerning Powell. These matters are thus undisputed on the record before us.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[7] We note that Powell's statements alone are more than sufficient to satisfy the animus and motive requirements for the 8(a)(3) violations in this case.

[8] Relying on *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995), the judge found that the fact that the discriminatees were "salts," sent by the Union to organize the Respondent's employees, did not affect their protected employee status under the Act. The Respondent no longer contests this issue.

versing the judge's credibility findings. Furthermore, as a general rule, Powell's activities, statements, and knowledge as the Respondent's agent are attributable to his employer. *Pinkerton's Inc.*, 295 NLRB 538 (1989). The Respondent has failed to establish a case against attribution here. Even assuming, arguendo, that Powell had no authority to hire or effectively to recommend hiring electricians at the Publix jobsite, it is undisputed that he received job applications and communicated with Parrish about applicants' credentials.[9] Absent credible evidence to the contrary, it is reasonable to infer that Powell would normally be aware of the Respondent's hiring criteria, including union animus, and that he would communicate his knowledge of applicants' union affiliation to Parrish.

In light of the above, and as further explained by the judge, we agree that the Respondent's defense of its conduct—addressing the discriminatees' asserted lack of qualifications and experience—was pretextual.[10]

The Respondent also excepted to the judge's findings that it had knowledge of the union membership of the four discriminatees at the time they applied for work, arguing that none of them identified himself as a union member on his application. We affirm the judge's findings on the question of knowledge concerning Newman, King, and Wedereit. Concerning Donelow, we conclude, based on the analysis below, that the Respondent at the very least *suspected* that he was a union member, and we further conclude that this suspicion constituted the basis for the Respondent's refusal to hire him. Refusals to hire based on such suspicions violate Section 8(a)(3) and (1) of the Act. See, e.g., *KRI Constructors*, 290 NLRB 802, 811 (1988); and *Big E's Foodland*, 242 NLRB 963, 968 (1979).

Powell's 8(a)(1) statements, and his related comment on November 8 that the Respondent feared hiring union members because of the previous organizing drive, conveyed a sense not only of union animus but of apprehension concerning the hiring of applicants who were union members. This specific sense of apprehension is confirmed in the unlawful refusal to hire Newman and King in November. The Respondent's knowledge of their union affiliation is inarguable in view of Powell's statements. Powell also made clear that their employment qualifications, except for their union membership, were acceptable to the Respondent. The Respondent's apprehension is further illuminated by its unlawful refusal to hire Wedereit in October. His union membership was clearly inferable by the Respondent in the circumstances, and his job qualifications were comparable to King's and Newman's. These three unlawful refusals to hire demonstrate a hiring process in which union membership was a "red-flag" issue requiring denial of employment.

Donelow, also a union member, applied for work with the Respondent in early February 1994. His job qualifications were comparable to those of the three discriminatees before him. He listed known union contractors in the prior employment section of his application, as the other three had done.[11] Significantly, the most recent employment he listed was with the Bechtel Company, a known union contractor operating at the Savannah River site, an immense nuclear power construction project near the Respondent's North Augusta jobsite. He listed September 1993 as his layoff date. Newman, King, and Wedereit all had listed Bechtel at the Savannah River site as their most recent employment. Newman and Wedereit, like Donelow, had listed September 1993 as their layoff date. Given the relevant similarities between Donelow's application and those of other three discriminatees, and the Respondent's established pattern of discrimination against union members, we infer that the Respondent at least suspected that Donelow was, like the other three, a union member, and under these circumstances we find that it unlawfully refused to hire him based on this suspicion.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Quality Control Electric, Inc., Savannah, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling job applicants that they will be denied employment because of their union membership.

(b) Discriminatorily refusing to hire applicants for employment because of their union membership.

[9] For instance, Powell specifically noted that J.D. Johnson had "extensive grocery store experience" on the job application Powell transmitted to Parrish.

[10] The Respondent did not contend that there were no job vacancies at the times the discriminatees applied for work, and the evidence would not support such a claim in any event.

Chairman Gould does not rely on the majority's characterization of the General Counsel's prima facie showing and the Respondent's rebuttal burden. He agrees that the General Counsel has met the ultimate statutory burden of proving the Respondent's antiunion motivation by a preponderance of the evidence.

[11] Donelow misidentified his electricians' apprenticeship training on his application in such a way that the Respondent could not reasonably have suspected that it was union affiliated. Accordingly, we do not rely on the apprenticeship training factor in our analysis.

[12] The Respondent hired Harold Goff, whose most recent employment had been with Bechtel at the Savannah River site, *after* unfair labor practice charges had been filed in this case, in an admitted attempt to show that it did not discriminate against union members. In addition, it appears that Fred Stretch, another of the Respondent's hires, previously worked for Bechtel at the Savannah River site. However, his Bechtel employment terminated 3 years before the relevant events in this case, and he had worked for three other employers between Bechtel and the Respondent. We find the Respondent's employment of Goff and Stretch does not undermine our analysis.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Noah Newman, Jimmy King, Alfred Wedereit, and Jeffery Donelow employment in the manner set forth in the remedy section of the decision.

(b) Make Noah Newman, Jimmy King, Alfred Wedereit, and Jeffery Donelow whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Savannah, Georgia, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 11 , after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 24, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell job applicants that they will be denied employment because of their union membership.

WE WILL NOT discriminatorily refuse to hire applicants for employment because of their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Noah Newman, Jimmy King, Jeffery Donelow, and Alfred Wedereit.

WE WILL make Noah Newman, Jimmy King, Jeffery Donelow, and Alfred Wedereit whole for any loss of earnings and other benefits resulting from discrimination, less any net interim earnings, plus interest.

QUALITY CONTROL ELECTRIC, INC.

Jane P. North, Esq., for the General Counsel.
Dion Y. Kohler, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart), of Atlanta, Georgia, for the Respondent.
Charles L. Wilkinson III, Esq., of Augusta, Georgia, for the Charging Party.

DECISION

INTRODUCTION

ROBERT C. BATSON, Administrative Law Judge. This case was heard at Augusta, Georgia, on August 28–29, 1995. The International Brotherhood of Electrical Workers, Local Union 1579 (the Union) has charged that Quality Control Electric, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Na-

tional Labor Relations Act (the NLRA or the Act). More specifically, the primary issues are whether Respondent violated the Act by (1) refusing to hire Noah Newman, Jimmy King, Jeffery Donelow, and Alfred Wedereit because of their union membership and (2) by making threats to job applicants that union members would not be hired.[1]

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I. BACKGROUND

The Respondent operates an electrical contracting business. Between October 1993 and April 1994 the Respondent was working on the construction of a Publix grocery store in North Augusta, South Carolina.[2] The Respondent does not have a collective-bargaining relationship with the Union.

II. SUPERVISORY STATUS OF JACK POWELL

Jack Powell worked as the Respondent's site superintendent at the North Augusta project. He left the project at the end of 1993. The Respondent denies that he was either a supervisor or agent for the Respondent as those terms are defined in the Act.

Powell was the Respondent's highest ranking official who was regularly at the North Augusta jobsite. He reported to a project manger, Mike Tyson, who oversaw various construction sites and was infrequently present at this project. Powell's authority included assignment of work, recommending hiring, granting employees time off, certifying time worked, authorizing overtime, and recommending discipline. Powell controlled the keys to the jobsite trailer. Powell was paid approximately $3 per hour more than the electricians working under his direction.

Based on his authority and duties, I find that Jack Powell was Respondent's supervisor and agent on the North Augusta project. NLRA Section 2(11) and (13).

III. THE REFUSAL TO HIRE UNION MEMBERS

The crux of this case is the Government's assertion that Respondent refused to hire four electricians because of their union affiliation. The Respondent asserts the men were not hired because they lacked significant commercial or grocery store electrical experience.

A. *Noah Newman and Jimmy King*

1. Newman's October 26 contact with the Respondent

Noah Newman is a journeyman union electrician. On October 26, 1993, he was advised by his local union's business agent, Edgar Rooks, that the Respondent was hiring electricians. Newman went to the Publix jobsite the same day and asked Superintendent Jack Powell about employment. According to Newman, Powell told him he was impressed with his credentials and he felt sure Newman would be hired. Newman's application listed several union contractors where he previously worked. Powell stated he would fax Newman's papers to Respondent's Savannah, Georgia home office as that is where the hiring decision would be made. Powell's practice was to speak with the Savannah office or the project manager about his hiring needs.

Powell told Newman that if he was interested in traveling work involving instrumentation he probably could be hired that day. Newman explained he had four children and was not interested in travel work.

2. King's application

On Tuesday, November 2, Newman, along with journeyman union electrician Jimmy King, returned to the jobsite. King's job application listed his union training and work for union contractors. The men talked to Powell who said he was impressed with both their credentials and would request them by name for hire when he faxed the applications to the home office.

Powell's recollection of his meetings with King and Newman was admittedly not good. He was not sure what he told them when they applied. He recalled generally the men told him they were good electricians with commercial experience. He recalled saying to them that sounded good to him and he would forward their applications. Powell also recalled that Newman volunteered to him that he was a member of the Union.

3. Supervisor Powell's telephone call to Newman

On Friday, November 5, Powell telephoned Newman at home at about 7 p.m. Newman testified that Powell said that the Company's owner had told him Newman could not be hired because of his union affiliation. Powell then asked Newman what was the least pay for which he would work. This inquiry puzzled Newman who asked why he wanted to know. Powell said that maybe he could "sneak" Newman on the job as a helper and the owner would not know about it. Newman told him with his many years of experience he did not feel he should have to work for helper's pay scale.

Powell said he would talk to the owners over the weekend and see if he could change their minds about hiring Newman. Powell explained he was having trouble manning the job and getting quality employees. Powell said that he had written a recommendation that both Newman and King be hired and that they were the only two of all of the applicants he had sought to hire.

Powell could not remember ever having a telephone conversation wherein he told Newman his union affiliation prevented his being hired. He conceded Newman "may have" asked him if the reason he was not getting hired was because of his union membership. Powell testified that there was a "good possibility" he told Newman the Union was the reason he was not hired in order "to get him off my back." He denied he had ever been told by anyone in Respondent's mangement that applicants could not be hired because of their union affiliation. Powell also denied that he had any knowledge of why Newman and King were not hired.

A written position statement was submitted by the Respondent during the investigation of the charges. In that statement the Respondent concedes that Powell told Newman in the November 5 telephone call that the reason he was not being hired was his union affiliation.

[1] At trial the Government withdrew the allegations of the complaint concerning Gary Fitzpatrick (Case 11–CA–15976).

[2] All subsequent dates refer to this time period unless otherwise specified.

4. The applicants' November 8 jobsite visit

The following Monday, November 8, Newman and King again went to the Publix jobsite and spoke with Powell. Powell reiterated that there was no problem with their applications, "except the Union thing." He said he would try to convince the owners to hire them because he thought it was wrong to deny them employment. Powell explained that a couple of years before the Union had tried to organize area electrical shops and that now nonunion companies were afraid to hire union personnel for fear of being organized.

5. King's mid-November conversation with Powell

Approximately a week after the November 8 meeting King went back to the jobsite by himself. He found Powell working on the back side of the job with men putting in the main electrical feed. Powell reiterated he was having a hard time manning the job and that King should check back in a week with him, but that his union affiliation was a big negative as to his application.

B. *Alfred Wedereit*

Alfred Wedereit is a journeyman electrician and a member of the Union. On October 12 Wedereit applied for work with Respondent at the Company's home office in Savannah, Georgia. He appeared at the office wearing a hat which displayed an IBEW union insignia. Wedereit filled out his application and noted as part of his experience his IBEW apprenticeship training and employment for union contractors.

C. *Jeffery Donelow*

Jeffery Donelow is a union member and has been a journeyman electrician for 5 years. He applied for electrician work at the Publix job on February 7, 1994. On his application he listed his apprenticeship training with the Union and various union contractors with whom he had worked. He has commercial electrician experience.

D. *Respondent's Defense*

The Respondent presented the testimony of Assistant Vice President Lisa Parrish concerning the Company's hiring practices. Parrish was responsible for approving the hiring of electricians. She explained that she was not familiar with the names of union organized companies in the area. She also stated that she would not hire electricians for commercial jobs who had industrial work backgrounds because of the differences in work. It was her feeling the four men involved in this case fell in that category.

On cross-examination Parrish was queried about the Respondent's attitude towards Unions. She acknowledged being told by Spenser Tyson, Respondent's president, that the Respondent was a nonunion company and he wanted it to stay that way. She denied that union considerations entered into her hiring decisions.

E. *Analysis*

1. The "salting" issue

As a threshold matter Respondent argues that none of the four union job applicants should be considered "employees" within the meaning of the Act. The argument is based on the premise that they served as organizers (salts) for the Union and sought employment to further the interests of the Union. This issue has recently been clarified by the Supreme Court. Voluntary and paid union organizers are considered employees within the definition of Section 2(3) of the Act and are entitled to its protection. *Town & Country Electric*, 116 S.Ct. 450 (1995); and *Martinson Electric Co.*, 319 NLRB 1226 fn. 2 (1995).

2. The 8(a)(1) violations

The Government alleges Respondent violated the Act when Powell made statements that union affiliation prevented applicants from being hired. The record sustains the conclusion these statements were made. Powell's demeanor and his admittedly hazy recollection of his conversations with King and Newman were not persuasive. I do not credit Powell's version of events. Even the Respondent admits the November 5 statement was made. In contrast to Powell, both King and Newman were credible witnesses who did not appear to embellish their testimony. They had detailed recollections of events and forthrightly answered all questions. Their testimony is credited that Powell made the alleged statements about not hiring them because of their union membership. These statements were made in Powell's November 5 telephone call to Newman, to Newman and King on November 8, and to King in mid-November. I find that these statements are a violation of Section 8(a)(1) of the Act.

3. The 8(a)(3) violations

I do not credit Respondent's assertion that Newman and King were refused employment, because they lacked commercial electrical experience. Rather the record fully supports the General Counsel's prima facie showing that the men were denied employment because of their union affiliation. The Respondent has failed to rebut that prima facie case. The statements made by Powell directly prove the illegal motivation. I also note the testimony of Parrish which supports this conclusion. She acknowledged that the Respondent was a nonunion company and wanted to remain nonunion. Because of her demeanor I likewise do not credit Parrish when she says she had no information about which area companies were union contractors.

The record as a whole demonstrates that the applicant's alleged lack of relevant experience was a pretextual reason declared in order to conceal the Respondent's unlawful motivation. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

As set forth above the Respondent has demonstrated a discriminatory motivation in refusing to hire union electrician applicants. Both Donelow and Wedereit fall within this classification. While the failure to hire union applicants because of that affiliation will not be lightly inferred, the record sustains that conclusion with regard to Donelow and Wedereit. Powell's statements are compelling evidence that applicants were unacceptable if they carried the stigma of union affiliation. The admitted desire of the Respondent to remain nonunion is a further indication of the Company's animus in this regard. Donelow and Wedereit sufficiently identified themselves as union members so that the inference is made that

they also were denied employment because of that affiliation. *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991).

In sum, I find that the Government has proven by a preponderance of the evidence that the refusal to hire Newman, King, Donelow, and Wedereit was a violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

CONCLUSIONS OF LAW

1. Quality Control Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Electrical Workers, Local Union 1579 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by telling applicants for employment that they are being denied employment because of their union affiliation.

4. Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire Noah Newman, Jimmy King, Jeffery Donelow, and Alfred Wedereit because of their union membership.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire Noah Newman, Jimmy King, Jeffery Donelow, and Alfred Wedereit it must offer them employment and make them whole for any loss of earnings and other benefits they may have suffered, with interest computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1987), and *Haberman Construction Co.*, 236 NLRB 79 (1978).

[Recommended Order omitted from publication.]